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Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S BRIEF

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ON APPEAL FROM THE SUPREME COURT OF VERMONT

APPELLANT'S BRIEF

Opinions Below

The findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's Determination of Appeal, dated April 11, 1974 ,which is set forth in JS. App.-1a;[1] the determination is unreported. The opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's order, dated January 6, 1977 and that court's final order, dated June 9, 1977, which are set forth in JS. App.-14a; the orders are unreported. The opinion of the Vermont Supreme Court reversing the Su-

[1] "JS. App." refers to pages in the appendix to the Jurisdictional Statement filed with this Court on February 2, 1979. "Br. App." refers to the appendices which appear at the end of this brief and "App." refers to the pages in the single appendix filed by the parties.

perior Court is reported at 394 A.2d 1147 (1978). The order and opinion of that Court are set forth in JS. App.-19a.

Jurisdiction

The final decree of the Vermont Supreme Court was filed on November 9, 1978. This appeal was docketed within 90 days from that date. On May 14, 1979, this Court noted probable jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Questions Presented

Where a State imposes an income tax on a corporation that is engaged in foreign commerce and the corporation is neither organized under the laws of the taxing State nor maintains its commercial domicile in that State, and the apportionable base of the income tax includes dividends received by the corporation from subsidiaries and non-subsidiaries conducting all their business in foreign countries:

(1) Does the inclusion of the foreign source dividends in the apportionable base of the tax violate the Due Process Clause of the Fourteenth Amendment where the only connection between the corporation and the taxing State was the sale of products in that State, and the shares on which the dividends were paid were held, managed and controlled by the corporation from its offices outside the taxing State and the receipt, use and disposition of the dividends were managed and directed from offices outside the State?

(2) Does the inclusion of the foreign source dividends in the apportionable base of the tax subject

the corporation to a risk of multiple taxation prohibited by the Foreign Commerce Clause?

(3) Is the taxation of the foreign source dividends on an apportioned basis invalid on the ground that it frustrates established Federal policy in regulating foreign commerce?

Constitutional and Statutory Provisions Involved

Commerce Clause (Art. I, § 8, cl. 3):

"The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes;"

Due Process Clause (Amend. XIV, § 1):

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

The pertinent sections of the Vermont Statutes Annotated, Title 32, sections 5811 (18) and 5833, are set forth in Br. App. A, p. 1a.

Statement of the Case

The Vermont income tax deficiencies in controversy are as follows:

Year	*Deficiency*	*Interest*	*Total*
1970	$15,078.56	$ 339.27	$15,417.83
1971	31,205.52	858.15	32,063.67
1972	25,359.69	443.80	25,803.49
Total	$71,643.77	$1,641.22	$73,284.99[2]

[2] The deficiency and interest for 1970 shown in the table include the gross-up of dividends. The Commissioner agreed to modify

(Footnote continued)

During the years at issue, 1970, 1971 and 1972, the appellant ("Mobil"), a New York corporation (Stipulation of Facts ["Stip"] ¶ 1, App. 79), was engaged in the United States in the petroleum business, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products, and in chemical and related mining businesses (Stip. ¶ 6, App. 81). Mobil was engaged in interstate and foreign commerce. (Stip. ¶ 8, App. 82). It was subject to net income taxes or franchise taxes measured by net income imposed by Vermont and some 40 other States and the District of Columbia. (*Ibid.*).

Mobil's corporate headquarters, principal place of business and commercial domicile were in New York City. (Stip. ¶ 7, App. 82). Its only activity in Vermont was the wholesale and retail marketing of petroleum products and related products. (Stip. ¶ 9, App. 82). It had no oil or gas production or refineries in the State (*Ibid.*)

Mobil owned the capital stocks of a large number of domestic and foreign corporations;[3] dividends were the major source of Mobil's taxable income. At December 31st of each year Mobil owned, directly or indirectly, cap-

the gross-up for that year in a manner consistent with the decisions in *F. W. Woolworth Company* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974) and *In Re Goodyear Tire & Rubber Company*, 133 Vt. 132, 335 A.2d 310 (1975). JS. App.-2a. In addition, there were added to the taxable base for each of the years comparatively small amounts of interest received by Mobil on securities, certificates of deposit and time deposits. No appeal has been taken with respect to the taxation of that interest. The tax deficiency figures set out above have not been adjusted for the foregoing items.

[3] The term "domestic" corporation refers to a corporation organized under the laws of one of the States, and "foreign" corporation to a corporation organized under the laws of a foreign country.

ital stock of foreign subsidiary,[4] and 5% or more of the capital stock of domestic and foreign non-subsidiary, corporations as follows (Stip. ¶ 10, App. 82):

	1970	*1971*	*1972*
Foreign Subsidiary Corporations	203	208	216
Domestic Nonsubsidiary Corporations	26	27	27
Foreign Nonsubsidiary Corporations	185	189	197

Mobil's shareholder equity, on a net worth book basis, in its foreign operating subsidiaries and foreign operating consolidated affiliates amounted to 45%, 47% and 48%, respectively, of Mobil's total net worth for the three years at issue. (Stip. ¶ 16, App. 84).

Mobil's business as the owner of the stocks was in all respects conducted, managed and directed at the company's offices outside the State of Vermont. (Stip. ¶¶ 7 and 11, App. 82-83). All dividends were received outside Vermont, and Mobil's control and use of the dividends were managed and directed from its offices outside that State. (*Ibid.*). More than 99% of the dividends at issue were received by Mobil from corporations deriving all, or all but an insignificant portion, of their income from sources outside the United States. (Stip. ¶ 26, App. 88).

The assessment in controversy is based on the inclusion in the tax base, before apportionment, of 15% of the dividends received by Mobil from domestic non-subsidiary corporations, in amounts ranging from approximately $17,800,000 to $25,900,000 for the years at issue, and 100% of the dividends received from subsidiaries and non-subsidiaries organized under the laws of foreign countries, in

[4] The term "subsidiary" refers to a corporation more than 50% of whose stock is owned by Mobil.

amounts ranging from approximately $156,000,000 to $264,000,000 (App. 75-78).[5]

Summary of Argument

1. *The Vermont Tax Is Invalid under the Due Process Clause.* Mobil contends that the Vermont apportioned tax on its foreign source dividends violates the Due Process Clause of the Fourteenth Amendment because there is no nexus between the State and the income being taxed. The stocks on which the dividends at issue were paid were held, managed and controlled outside the State, and the receipt, use and disposition of the dividends were managed and directed entirely outside Vermont.

A State's power to tax a corporation, organized under the laws of another State, and doing business in the State, cannot, under the Due Process Clause, be extended to transactions or income with which the State has no definite link or minimum connection. To do so would violate the recognized principle that State taxation must bear a fiscal

[5] The Vermont income tax law conforms to the Federal corporation income tax rules by excluding from the tax base, before apportionment, all dividends received from 80% or more owned domestic corporations and 85% of the dividends received from domestic corporations that are less than 80% owned (subject to technical qualifications). IRC § 243, Vt. § 5811(18), Br. App. A, p. 1a. The State law also follows the Federal rule of including in the tax measure all the dividends received from corporations organized under the laws of foreign countries (with exceptions not here applicable). IRC §§ 243, 245, Vt. *ibid.* Unlike the Federal income tax, the Vermont tax grants no credits for foreign income taxes paid either by the taxpayer or by a dividend-paying foreign corporation, 10% or more of whose stock the taxpayer owns. IRC §§ 901-902, Vt. *ibid.*

Under the Vermont law the dividends taxed are included in the apportionable tax base along with operating income. The apportionment is made under a three-factor formula consisting of property, payroll and gross sales or charges for services performed. Br. App. A, p. 2a. Dividends are not included in the numerator or denominator of the gross sales or charges for services factor.

relation to the protection, opportunities and benefits provided by the State. Because Mobil's only activities in Vermont related to the sale of its products, the tax lacks the due process links to the foreign source dividends requisite to their taxation by the State.

This contention is not in conflict with *Moorman Manufacturing Co.* v. *Bair* (437 U.S. 267 [1978]), because the controversy in that case involved a challenge to a State's method of apportionment of admittedly taxable operating income. Mobil is not challenging Vermont's method of apportionment but, instead, its power to tax the dividends under any method of apportionment or allocation.

2. *The Vermont Tax Conflicts with the Foreign Commerce Clause.* This Court's tolerance of multiple taxation of operating income derived from interstate commerce as a result of conflicting methods of allocation and apportionment, is inapplicable to the case at bar. Here, because foreign commerce is involved, multiple taxation attributable to such diversity in the methods of dividing income is constitutionally unacceptable.

The decisions of this Court establish that the test of multiple State taxation prohibited under the Commerce Clause lies in the power of other States to tax; they do not require a showing of actual duplicative taxation by other States.

The Vermont apportioned tax on the foreign source dividends is unconstitutional under the multiple taxation doctrine, because (a) the diversity of State allocation and apportionment methods applicable to dividends inevitably produces a risk of duplicative taxation; (b) the State of a dividend recipient's commercial domicile has long been recognized by the practice of the States, and by decisions of State and lower Federal courts, as having the power to tax dividends in full; and (c) there is no constitutional

warrant, and no basis in the fiscal policy underlying jurisdiction to tax, for depriving the State of commercial domicile of this traditional power of taxation.

Affirmation by this Court of the principle that foreign source dividends received by a corporation engaged in foreign commerce are taxable in full by the State of the corporation's commercial domicile, and that no other State may include the dividends in its apportioned tax, is supported by precedent. This Court has resolved multiple taxation issues in two other Commerce Clause areas—interstate sales and use taxation and State taxation of property used in foreign transportation—by limiting the tax exclusively to a single jurisdiction.

3. *The Vermont Tax is Incompatible with Federal Policies Regulating Foreign Commerce.* A policy of eliminating double taxation of foreign source income has long been established in Congressional income tax legislation. United States tax treaties with a large number of countries also reflect Federal policies of eliminating at the national level double taxation of dividends derived from foreign source earnings, and of encouraging the payment of dividends to United States corporations.

The Vermont tax on Mobil's foreign source dividends frustrates these Federal policies, as well as other Federal legislation designed to foster foreign commerce, by subjecting corporations that receive such dividends to a risk of multiple taxation of the income at the State level. Multiple State taxation of foreign source dividends tends to discourage foreign commerce, is a disincentive to the payment of the dividends to United States corporations, and, accordingly, frustrates the purposes of the Federal policies to the contrary. The Vermont tax is, therefore, repugnant to the Commerce Clause.

ARGUMENT

I.

The Inclusion of Mobil's Dividends in the Vermont Tax Base Violates the Due Process Clause Because There Is No Connection Between Mobil's Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed.

Under the Due Process Clause, "while a State may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra-territorial operation". (*Frick* v. *Pennsylvania*, 268 U.S. 473, 489 [1925].) This Court has given "consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344-345 [1954]).

Here, since all of Mobil's business and activities relating to its ownership, management and control of its stocks and the dividends they produced, were carried on outside the taxing State, the "definite link" or "minimum connection" required by the Due Process Clause to sustain the Vermont tax is missing. Moreover, there is no nexus between Vermont and the underlying earnings out of which the dividends were paid, since the payor corporations conducted no business, maintained no offices or employees, owned or leased no property, and derived no income from sources within the State. (Stip. ¶¶ 25-27, App. 88).

The fact that Mobil engages in the wholesale and retail marketing of products in Vermont does not warrant taxation of the income from its holding company and investment business conducted entirely outside the State. In

Norton Co. v. *Department of Revenue* (340 U.S. 534, 537 [1951]), the Court stated:

> ". . . when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature."

The requisite showing has been made in the instant case. All the transactions and all of Mobil's activities and operations having to do with the stocks and the dividends at issue were disassociated from its business in Vermont. All the dividends were derived from foreign source earnings.

The State of a corporation's commercial domicile is, by definition, the seat of the control and management of its affairs. (*Wheeling Steel Corporation* v. *Fox*, 298 U.S. 193 [1936]; *First Bank Stock Corporation* v. *Minn.*, 301 U.S. 234 [1937]). It is there that the executive and financial officers of corporations and their staffs customarily carry on the corporation's business and activities as owners and investors in the stocks in their subsidiaries and affiliates. Mobil's commercial domicile was located in New York (Stip. ¶ 7, App. 82). The activities, personnel and property of Mobil in Vermont, in which only the marketing of petroleum and related products was conducted, have nothing to do with Mobil's holding of stocks in foreign subsidiaries or affiliates or its foreign investments, or the dividend income they produce. Vermont provides Mobil no benefits or protection and it incurs no social costs in furnishing any public services to Mobil with respect to the Company's ownership or management of the stock of its subsidiaries or non-subsidiaries, or in its handling and disposition of its foreign source dividend income. On

these facts Vermont has no constitutional basis for taxing the dividends in issue, for as stated in *Wisconsin* v. *J.C. Penney Co.* (311 U.S. 435, 444 [1940]):

> "[T]he . . . test is . . . whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

A. *Moorman Is Inapplicable to the Due Process Issue in This Case.*

Moorman Manufacturing Co. v. *Bair, supra,* is not inconsistent with the contention here being made, for that case dealt with a challenge to the State's method of apportioning admittedly taxable income. In *Moorman* the income arose from selling and warehousing carried on in the State, the taxability of which was conceded; the controversy related to Iowa's method of apportionment. Jurisdiction to tax was not at issue in *Moorman.* Indeed, in *Moorman* Iowa did not include the taxpayer's dividend income in the taxable base or in the apportionment. (437 U.S. at 269).

In this case, on the contrary, we are not here challenging Vermont's method of apportionment, but instead contend that the State lacks jurisdiction under the Constitution to include the dividends in the tax base under any method of apportionment.

While this Court has generally abstained from intervening in taxpayers' challenges to State methods of apportionment, except in the most flagrant cases, *Moorman* being the most recent and most articulate enunciation of that policy, the Court has followed a different policy in dealing with jurisdiction of the States to tax. When it

has been confronted with taxpayers' challenges to the power or jurisdiction of a State to tax, whether under the Due Process or the Commerce Clause, this Court has always recognized its constitutional role as arbiter between taxpayers and the various States.[6]

There are very good reasons for this difference in the Court's functioning in the apportionment and jurisdictional areas of State taxation. *Apportionment* involves highly technical problems of accounting and an intimate knowledge of the methods of operation and the available records and data of a wide variety of industries, as well as evaluation of the impact on taxpayers and on the revenues of the differing State economies of diverse techniques of dividing income. Typically, any one of several alternative formulas may be reasonable and viable. Such matters need to be resolved, in broad outlines at least, by legislators, after extensive factual investigation with the advice and assistance of tax administrators and other experts, and a determination of the dollar consequences of alternative solutions to multistate, multinational and local business and to the revenues of the various States. Institutionally, courts are not equipped, and do not have the supportive facilities, to resolve such questions.[7] Nor do they have the constitutional power to adopt the most desirable policy, since the judicial role is the limited one of determining whether a particular method of apportionment, applied by a State to the taxpayer before the Court, violates the provisions of the Constitution restricting the powers of the State to tax. (See *Moorman Manufacturing Co.* v. *Bair, supra*, 437 U.S. at 280.)

The delineation of the constitutional powers of the State *to tax* business, activities, transactions, income, or the like is a very different matter. The types of questions that arise in accommodating, under our Federal system, the revenue needs of the States with the interest of multistate and multinational businesses in being safeguarded against undue tax burdens not borne by local business, and at the same time protecting the Federal interest in maintaining a vigorous national economy, are within the province and competence of the courts, and indeed, are of a character that are grist in the mill of this Court's role in passing on various types of constitutional controversies.

Accordingly, *Moorman* has no bearing on the Due Process issue in this case.

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[6] *Frick* v. *Pennsylvania*, 268 U.S. 473 (1925) and *Treichler* v. *Wisconsin*, 338 U.S. 251 (1949). Real and tangible personal property are taxable under death tax laws only of the State in which the property is located.

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954). A State(S) is without constitutional power to require a department store located in a neighboring State(N) to collect a use tax on sales of goods to residents of S, where the sales were made in N, although delivery was made to customers in S.

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967). A State does not have the power to require an out-of-state mail order house having no offices, employees or property in the State, but making all its contacts with customers in the State via United States mail or common carrier, to collect a use tax on sales to local residents.

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954). The Commerce Clause prohibits a State from levying a tax on an interstate pipeline on its taking of natural gas in the State from its supplier into the pipeline for transportation to other States.

Evco v. *Jones*, 409 U.S. 91 (1972). The Commerce Clause prohibits a State from imposing a gross receipts tax on receipts from sales outside the State of goods produced within the State.

[7] See, Hartman, "State Taxation of Corporate Income from a Multistate Business", 13 Vand L.Rev. 21, 124 (1959).

II.

The Vermont Apportioned Tax on Mobil's Foreign Source Dividends Violates the Foreign Commerce Clause Because It Subjects the Taxpayer to a Risk of Multiple Taxation.

A. *The Principles Enunciated by This Court in* Japan Line *Apply to the Commerce Clause Issue in This Case.*

The multiple taxation doctrine prohibits the States from subjecting interstate or foreign commerce to risks of duplicative taxation not borne by intrastate commerce. (See point B, p. 16 *infra*). The recent decision of this Court in *Japan Line Ltd.* v. *County of Los Angeles* (47 U.S.L.W. 4477 [April 30, 1979]) has made it clear that the duplicative State taxation resulting from the diversity of State apportionment and allocation methods, constitutionally tolerable in dealing with State taxation of operating income from interstate commerce, is not tolerable in dealing with State taxation of foreign commerce.

The principles enunciated in *Japan Line* are applicable to the present case. There the Court invalidated a property tax imposed by the County of Los Angeles on shipping containers used exclusively in the transportation of cargo in foreign commerce by Japanese corporations having their principal places of business and commercial domiciles in Japan, even though the containers had an adequate nexus with the County and the tax was deemed to be fairly apportioned. The tax was invalidated on two grounds: (1) that the California tax resulted in multiple taxation of foreign commerce; and (2) that the tax was in conflict with established Federal policy and, accordingly, would prevent the Federal government from "speaking with one voice" in international trade.

The Court found it unnecessary in the *Japan Line* case to reach the question as to the validity under the Foreign Commerce Clause of an apportioned State property tax on domestically owned instrumentalities of foreign commerce. (47 U.S.L.W. at 4480, note 7). Nevertheless, it is submitted that the same basic principles as underlay the Court's invalidation of the tax on the containers of the Japanese, foreign based corporations, are applicable to the taxation of corporations organized and domiciled in the States of this country. Surely, the Foreign Commerce Clause is designed to provide at least as much protection from undue burdens of State taxation on foreign commerce to United States corporations based in this country, as to foreign corporations based abroad. And the supremacy of the Federal government in regulating commerce with foreign nations, likewise, applies at least in *pari passu* to State taxation of United States enterprises as to taxation of foreign enterprises. Indeed, Federal Executive actions and Congressional legislation designed to encourage foreign trade have been utilized principally to benefit and protect American corporations based in this country that operate in foreign commerce. (See III, p. 38 *infra*).

This Court recognized as early as *Gibbons* v. *Ogden* (9 Wheat. 1, 192 [1824]) that the Foreign Commerce Clause "comprehend[s] every species of commercial intercourse between the United States and foreign nations". See also (*Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 56 [1933]). It has struck down State taxes imposed on corporations organized and domiciled in this country when it has found the tax violative of the Foreign Commerce Clause, or in conflict with Congressional legislation adopted to "enable American manufacturers to compete more favorably with their foreign competitors". (*McGoldrick* v. *Gulf Oil Corporation*, 309 U.S. 414, 427

[1940], which is discussed at p. 44 *infra; Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292 [1917]).

B. *The Test of Multiple Taxation Is the Power of Other Jurisdictions to Tax, and Does Not Depend on the Exercise of That Power.*

The Vermont court held that the multiple taxation restraint on State taxation of income under the Commerce Clause depends on a showing of actual taxation by other jurisdictions, citing the *Moorman* case, *supra, Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 278 (1977); *General Motors Corp.* v. *Washington,* 377 U.S. 436, 449 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462-63 (1959). (JS. App.-29a). This, we submit, is an erroneous reading of the cases.

1. The Development of the Multiple Taxation Doctrine.

It is indisputable that the architects of the multiple taxation doctrine viewed the *power* of other States to tax, irrespective of its actual exercise, as the test of multiple taxation prohibited by the Commerce Clause. That doctrine had its origin in, and was an essential concomitant to, the broadening by this Court beginning in the middle 30's of the powers of the States to tax transactions in, and income derived from, interstate commerce. (*Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 [1938]; *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33 [1940]; *International Harvester Co.* v. *Evatt,* 329 U.S. 416 [1947]). That process has continued, and was marked dramatically by the Court's holding in 1959 that a State may impose a fairly apportioned net income tax on the income of an exclusively interstate business (*Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves & Fittings, Inc.,* 358 U.S. 450 [1959]), and by its recent decision overruling the long-standing principle that

an excise or franchise tax on a foreign corporation for the privilege of conducting an exclusively interstate business in the State is repugnant to the Commerce Clause (*Complete Auto Transit, Inc.* v. *Brady, supra*; see also, *Department of Revenue of the State of Washington* v. *Association of Washington Stevedoring Companies,* 435 U.S. 734, [1978]).

Although the Court swept away the traditional view that under the Commerce Clause "interstate commerce may not be taxed at all" and that the Commerce Clause created an area of trade free of State taxation, it by no means left interstate commerce unprotected, in the silence of Congress. In place of the tax-free haven doctrine, there was erected the multiple taxation doctrine, under which taxes on interstate businesses are held to conflict with the Commerce Clause, if they subject interstate commerce to a risk of multiple taxation not borne by intrastate commerce. (*Western Live Stock* v. *Bureau of Revenue, supra; McGoldrick* v. *Berwind-White Coal Mining Co., supra*). The multiple taxation doctrine became the key constitutional protection against State taxes that are not *per se* discriminatory but, nevertheless, impose undue tax burdens on interstate commerce. As stated by this Court:

> "The vice characteristic of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature *as to be capable,* in point of substance, *of being imposed* . . . or added to . . . *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." (Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255-56 [1938]; emphasis added).

"Again, the State may not impose cumulative burdens upon interstate trade or commerce. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434; 59 S.Ct. 325, 83 L. Ed. 272; J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307; 58 S.Ct. 913, 82 L. Ed. 1365, 117 A.L.R. 429. Thus, the state may not impose certain taxes on interstate commerce, its incidents of instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and *either the actuality or the risk of their doing so* makes the total burden cumulative, discriminatory or special." (Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 358 [1944]), *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340; emphasis added).

2. The Decisions of This Court Do Not Support the Actual Multiple Taxation Test.

The view now being urged by some States, that the multiple taxation prohibition on State taxation of interstate commerce depends on actual, rather than the risk of multiple taxation, appears to stem from a statement in the opinion in *Northwestern States Portland Cement Co., supra*, that:

". . . the taxpayers must show that the formula places a burden on interstate commerce in a constitutional sense." (358 U.S. at 463).

The quoted statement is not at odds with our position. At the outset of the paragraph of the opinion in which the statement is found, the Court said, in discussing the possibility that a multiple tax burden resulted from the taxes at issue:

". . . none is shown to exist here. This is not an unapportioned tax which by *its very nature* makes interstate commerce bear more than its fair share . . ." (358 U.S. at 462; emphasis added).

The Court was addressing itself, not to proof that another State had in fact taxed the income that Minnesota and Georgia, the States whose taxes were being challenged, sought to include in the apportioned measures of their taxes, but to the "very nature" of the levies in creating "the possibility of a multiple burden . . ." (*Ibid.*). That is the import of the statement that "the taxpayers must show that the formula places a burden upon interstate commerce *in a constitutional sense.*" (*Id.*, 358 U.S. at 463; emphasis added).

Two other opinions of this Court, both involving the Washington business activities tax, have been cited by some State tax administrators to support the contention that the multiple taxation prohibition on State taxation depends on a showing of actual taxation of the same thing by another State. In the first case, *General Motors Corp.* v. *Washington*, (377 U.S. 436, 449 [1964]), the Court said:

". . . In Northwestern States Portland Cement Co. v. Minnesota . . . , we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense.' Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. *Cf.* International Harvester Co. v. Evatt, 329 U.S. 416, 421-423, 67 S. Ct. 444, 446-448, 91 L.Ed. 390,

394-396 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales."

This opinion does no more than affirm that a State tax is in conflict with the Commerce Clause if the taxpayer shows either that the tax (a) by its nature "places a burden on interstate commerce in a constitutional sense", or (b) that another State has in fact exercised its constitutional power to tax the same thing. That is precisely what Mr. Justice Rutledge, one of the chief architects of the multiple taxation doctrine, stated in defining the doctrine:

> ". . . the state may not impose certain taxes on interstate commerce . . . because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and *either the actuality or the risk* of their doing so makes the total burden cumulative. . ." (*McLeod* v. *Dilworth, supra,* 322 U.S. at 358; emphasis added).

In the other Washington case, *Standard Pressed Steel Co.* v. *Department of Revenue of Washington* (419 U.S. 560, 563 [1975]), Mr. Justice Douglas wrote:

> "We noted in *General Motors* that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it, *id.,* at 449, 84 S.Ct. 1564. The corporation made no such showing there. Nor is any effort made to establish it here."

That this statement is consonant with our view that multiple taxation may be shown by the risk, as distinguished from the exercise, of the power of taxation of other jurisdictions becomes evident from the remainder of the paragraph from which the foregoing is quoted. The opinion there quotes with approval the exposition of the multiple taxation doctrine as set forth in *Gwin, White & Prince, Inc.* v. *Henneford* (305 U.S. 434, 439 [1939]):

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, *'the risk of a multiple burden to which local commerce is not exposed.'* " (419 U.S. at 564; emphasis added).[8]

The most recent opinion referring to the question, *Japan Line,* indicates that the actual double taxation test has by no means been embraced by this Court as the constitutional standard for adjudging whether a State tax subjects commerce to multiple taxation.[9]

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[8] Neither *Complete Auto Transit,* 430 U.S. at 278, nor *Moorman,* although both were cited by the Vermont court, considered the issue of the risk versus the actuality of double taxation under the Commerce Clause. The Vermont court's reference to *Moorman* (98 S.Ct. at p. 2346) is to the taxpayer's contention that it had established actual duplication of taxation by Iowa of income taxed in Illinois. This Court found the evidence faulty, but there is no consideration in the opinion of the propriety of the risk test of multiple taxation, as contrasted with actual multiple taxation.

[9] "Because California's tax in this case creates multiple taxation in fact, we have no occasion here to decide under what circumstances the mere *risk* of multiple taxation would invalidate a state

(Footnote continued)

3. The Propriety of the Risk Test.

The risk test, as envisioned by the creators of the multiple taxation doctrine, Justices Stone and Rutledge, is we submit, the proper one. The reasons underlying that view were stated by Mr. Justice Frankfurter:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." (*Freeman* v. *Hewit*, 329 U.S. 249, 256 [1946]).

Mr. Justice Goldberg expressed the same view:

> "Presumably, if there is to be limitation of the taxing power of each of these States, that limitation surely cannot be on a first-come-first-tax basis." (See dissent in *General Motors Corporation* v. *Washington, supra*, 377 U.S. at 458).

This Court has recently had occasion to consider the same basic question in a different context. In *Austin* v.

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tax, or whether the risk would be evaluated differently in foreign, as opposed to interstate, commerce. Compare Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276-277 (1978), and Washington Revenue Dept., 435 U.S. at 746, with, *e.g.*, *Central R. Co.*, 370 U.S. at 615; Ott. 336 U.S. at 175; and Northwest Airlines, 322 U.S. at 326 (Stone, C.J., dissenting)." *Japan Line, supra*, 47 U.S.L.W. at 4482, note 17.

New Hampshire (420 U.S. 656 [1975]), it was held that the New Hampshire commuters income tax violated the constitutionally protected privileges and immunities of residents of Maine who worked in New Hampshire. New Hampshire sought to meet the challenge that the tax, which did not apply to residents of that State, discriminated against non-residents, on the ground that the tax on non-residents was interlocked with the credit granted under the income tax law of Maine to its own residents for income taxes paid to other States. The State argued that:

> "the only practical effect of the tax is to divert to New Hampshire tax revenues that would otherwise be paid to Maine, an effect entirely within Maine's power to terminate by repeal of its credit provision for income tax paid to another State." (420 U.S. at 666).

This Court rejected the argument, stating, *inter alia*:

> "Nor . . . can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State." (*Id.* at 668).

Accordingly, we submit that the potential for multiple taxation, rather than the actuality of multiple tax burdens, is the proper test of the constitutionality of State taxes under the Commerce Clause.

C. The Risks of Multiple Taxation Growing Out of the Diverse State Methods of Dividing Income, Found Constitutionally Tolerable in the Taxation of Operating Income From Interstate Commerce, Are Not Tolerable in the Case of Taxation of Dividends From Foreign Commerce.

In *Japan Line, supra*, the Court declared that "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instru-

mentalities of foreign, rather than of interstate commerce." For, as pointed out in *Bowman* v. *Chicago & N.R. Co.* (125 U.S. 465, 482 [1888]):

> "It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States."

The first inquiry that the Court made in *Japan Line* was "whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation" (*id.* at p. 4482), and it concluded that an apportioned tax on the containers would subject the foreign shipping lines to multiple taxation, since our courts have no power to prevent duplicative taxation by other countries.

Although there are factual differences between *Japan Line* and the case at bar, none warrants a difference in result. First, the fact that the taxpayers in *Japan Line* were international shippers and that Mobil is an international petroleum company, can be dismissed summarily. The Foreign Commerce Clause is not limited to international transportation.

The other difference in the factual patterns of the two cases, that *Japan Line* involved the risk of multiple taxation by a foreign country and one of the States of this country, whereas in the case at bar the risk is that of multiple taxation by more than one of the States, requires fuller consideration. To be sure, this Court has power to prevent multiple taxation by more than one State, whereas it is powerless to prevent taxation by a foreign country of income that is also taxable by a State. However, as this Court has construed its constitutional

role, it is not within its province to prevent multiple taxation of operating income from interstate commerce by two or more States as a result of the utilization by them of diverse or conflicting methods of apportionment. Because the "prevention of duplicative taxation . . . would require national uniform rules for the division of income" (*Moorman Manufacturing Co.* v. *Bair, supra,* 437 U.S. at 279), the Court has concluded that it has neither the constitutional power nor the institutional capacity to prescribe such apportionment rules. (*Ibid.*).

This limited constitutional posture has been adopted despite this Court's recognition that multiple taxation of income from interstate commerce will ensue. It has declared that "some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income", so that "the potential for attribution of the same income to more than one State is plain". (*Ibid.*).

The standards used by the Court in passing on the validity of various State formulas, or of their application to particular taxpayers as applied to interstate commerce, have allowed the States very wide latitude in devising their apportionment methods. "[R]ough approximation rather than precision" has sufficed to satisfy the Due Process and Commerce Clauses. (*Illinois Central Railway* v. *Minnesota,* 309 U.S. 157, 161 [1939]). "Unless a palpably disapportionate result comes from an apportionment", this Court has been unwilling "to nullify honest State efforts to make apportionments of income from interstate commerce". (*International Harvester Co.* v. *Evatt,* 329 U.S. 416 [1947]). As stated most recently in *Japan Line*:

> ". . . this Court consistently had held that the Commerce Clause 'does not call for mathematical exact-

ness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside.' Northwest Airlines v. Minnesota, 322 U.S. at 325 (Stone, C.J., dissenting). Accord, Moorman, 437 U.S. at 274 . . ." (47 U.S.L.W. at 4483).

Accordingly, if this Court should exercise the same kind of restraint in reviewing State tax apportionment of foreign source dividends as it has shown in reviewing State apportionment of operating income from interstate commerce, Mobil will receive no protection from this Court with respect to duplicative State taxation of the foreign source dividends resulting from the diverse apportionment and allocation methods employed. *De facto* Mobil would receive no more protection from this Court against duplicative taxation of its foreign source dividends by the States of this country than this Court was able to provide the Japanese shipping lines with respect to duplicative taxation of their containers by foreign countries—which is no protection at all. The consequence would be that the foreign source dividends at issue would be subjected to a risk of multiple State taxation, which would be contrary to this Court's declaration that in the taxation of foreign commerce "overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." (*Japan Line, supra,* 47 U.S.L.W. at 4483).

D. *The Risk of Multiple Taxation of Foreign Commerce Created by the Vermont Tax Is Real and Substantial.*

That the risk of multiple State taxation of foreign source dividends is real and substantial becomes apparent from a consideration of the apportionment methods used by Vermont and other States. Of the 34 States that tax foreign source dividends, in whole or in part, 27 apportion some or all the dividends.[10] The potential for double taxation by the 27 States—in all of which Mobil, like many other multinational corporations do business[11]—is manifest from the diversity in the formulas employed by those States.[12]

[10] See Br. App. B, p. 4a.

[11] Mobil was subject to taxes measured by net income in 41 States and the District of Columbia. Stip. ¶ 8, App. 82.

[12] An examination of the formulas of the 27 States that apportion taxable dividends in whole or in part bears out this statement. In some States in which the Uniform Division of Income for Tax Purposes Act ("UDITPA"), (see CCH State Tax Guide, All States ¶ 10-000) has been adopted, the taxpayer has the option to use either UDITPA or the traditional formula. As a consequence, in Colorado, the taxpayer may employ either a two-factor property and receipts formula or the UDITPA three-factor formula (Br. App. C-1, p. 6a) and in Hawaii manufacturers or producers may use a two-factor property and payroll formula as an alternative to UDITPA. HAW. REV. STAT. §§235.5(e)(1), 235.21 *et seq.*, CCH 12-419, 92-431 *et seq.*

There is also variation in the weight given the factors employed. Thus, in Massachusetts and Wisconsin, the receipts factor is given a 50% weighting, whereas in most States that factor receives a 33⅓% weighting, equally with the property and payroll factors. Br. App. C-1, p. 6a.

There is also significant variation among the States in implementation of the same factors. Many States utilize the sales destination test for assigning receipts from sales of goods to the numerator of the State's receipts factor. Br. App. C-2, p. 8a. Vermont, however, employs a different test of sales attribution. It assigns receipts from sales to the State, if the goods are there located at the time of their appropriation to the order, under the so-called origin rule. *Ibid.*

In a good many States that use the sales destination test, a "throw back" rule is employed if the purchaser is the U.S. Government, or the taxpayer is not taxable in the purchaser's State. Under this rule, receipts from the sales revert to the State of origin, i.e., the State from which the goods were shipped. Br. App. C-2, p. 8a. Other States, however, do not use the throw back rule. See Maryland, New Jersey, Rhode Island. *Ibid.*

Some States attribute receipts from sales of goods under the sales negotiation or sales office rules. Thus, under the traditional

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That the amounts involved are of major significance to corporations engaged in foreign commerce is indicated by the fact that it has been estimated that foreign source dividends in the amounts of $2.2 billion from subsidiaries and $520 million from non-subsidiaries were included in the corporate tax base of the States in 1972.[13]

Colorado rule, which may be elected by the taxpayer, receipts from sales of goods are assigned to the State in which the sales negotiation activity took place. *Ibid.*

There are likewise numerous disparities in the property factors used by the States. In 22 of the 27 States that apportion foreign source dividends, the original cost of real and tangible personal property is used in the property factor. Br. App. C-5, p. 14a. Three States, New Jersey, Rhode Island and Vermont, use net book value. In Colorado (under its traditional formula) and Massachusetts, the depreciated Federal tax base is employed. *Ibid.* In Colorado, if the taxpayer elects to apportion income under UDITPA, the original cost of the property is used. *Ibid.*

Although most States include rented real and tangible personal property in the factor, the New Jersey Corporation Business Tax and the Colorado traditional formula ignore all rented property, and Vermont takes into account only rented real property. Br. App. C-3, p. 10a.

In a good many States inventory in transit between the taxing State and other States is included in the property factor of the States of destination of the goods, but in New Jersey, Rhode Island and Vermont, such goods are excluded entirely from the property factor. *Ibid.*

Since the apportionment factors result in a fraction that is applied to all the taxpayers' apportionable income, it is apparent that if the States were permitted to apportion foreign source dividends, there would be a substantial risk that duplicative taxation of the same income would occur. See *Moorman Manufacturing Co.* v. *Bair, supra,* 437 U.S. at 276.

[13] See Carlson, "State Taxation of Corporate Income From Foreign Sources", *Essays In International Taxation: 1976,* 231, 266, Department of the Treasury, Washington, D.C. (1976).

In 1973, more than 100,000 corporations reported net dividend income from foreign and domestic corporations on their Federal income tax returns. Internal Revenue Service, Statistics of Income —1973, Corporation Income Tax Returns, U.S. Government Printing Office (1977).

E. *The Traditional State Practice of Attributing Dividends Solely to the Taxpayer's Commercial Domicile Accords With Accepted Precepts of Fiscal Policy and Eliminates the Risk of Multiple Taxation of Foreign Source Dividends.*

1. History and the Judicial Decisions Support Taxation of Dividends Only by the State of Commercial Domicile.

The State of a corporation's commercial domicile has long been recognized as having the constitutional power to tax dividends in full, and there is no legitimate constitutional basis for depriving it of that power. Allocation of dividends to the taxpayer's commercial domicile, based on the doctrine of *mobilia sequuntur personam,* was the traditional method used in State taxation.[14] This is the current practice in a number of States.[15] Although the question has never been decided by this Court,[16] the power of the

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[14] See the survey made in 1941 in Watson, "Allocation of Business Income for State Income Tax Purposes", 25 Minn.L.Rev. 851, 858-862. In a 1959 study, Professor Paul Hartman reported that of the 34 States then imposing corporate taxes measured by net income, specific allocation was provided by explicit provision in 15 of the States and the District of Columbia; in most cases the dividends were allocated to the State of the taxpayer's principal place of business or its domicile. "State Taxation of Corporate Income from a Multistate Business". 13 Vand.L.Rev. 21, 49, 59. In five other States the specific allocation provisions were less clear, but the author regarded them as broad enough to include dividends; in eight States there were no specific allocation provisions. *Id.* at p. 61. See, also, "State Taxation of Interstate Commerce", Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee, Vol. 1, p. 204 *et seq.* (88th Cong. 2d Session H.R. No. 1480) (Willis Comm. Rep.).

[15] Arizona, California, Louisiana, Minnesota, Mississippi, Oklahoma and South Carolina allocate all taxable dividends to the State of commercial domicile. In 18 other States and the District of Columbia non-business dividends are likewise allocated to the commercial domicile. See Br. App. B, p. 4a.

[16] The decisions of this Court dealing with the taxation of shares of stock do, however, lend strong support to the view that the State of a corporation's domicile is empowered to tax dividends in

(Footnote continued)

State of a corporation's commercial domicile to tax the corporation's dividends, without apportionment, has been sustained over the years by intermediate Federal and by State courts.[17]

2. Fiscal Policy Considerations Underlying Jurisdiction to Tax Justify Taxation of Dividends Solely by the State of Commercial Domicile.

Fiscal policy considerations, as well as history, lend support to the recognition of the power of the recipient's State of commercial domicile to tax dividends in full and to the denial of the authority of other States to include the dividends in the apportionable bases of their taxes.

The State of a corporation's commercial domicile is, by definition, the seat of the control and management of its affairs, where the corporation's business and activities as the owner of the stocks in its subsidiaries, affiliates, and other corporations are customarily conducted. (See *Wheeling Steel Corp.* v. *Fox, supra; First Bank Stock Corp.* v. *Minnesota, supra.*) This is to be contrasted with the direct operating functions, such as manufacturing, producing and selling, typically carried on in many other States, activ-

full. In *First Bank Stock Corp.* v. *Minnesota,* 301 U.S. 234, 240 (1937), this Court said:

"... this Court has often upheld and never denied the constitutional power to tax shares of stock at the place of the domicile of the owner. Hawley v. Malden, 232 U.S. 1, 11, 12; Klein v. Board of Tax Supervisors, 282 U.S. 19, 24; Wright v. Louisville & Nashville R. Co., 195 U.S. 219; Kidd v. Alabama, 188 U.S. 730; Darnell v. Indiana, 226 U.S. 390."

[17] *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942); *Southern Pacific Company* v. *McColgan,* 68 Cal. App.2d 48, 156 P.2d 81 (1945); see *United Gas Corporation* v. *Fontenot,* 241 La. 488, 129 So.2d 748 (1961); *Pacific Telephone and Telegraph Company* v. *Franchise Tax Board,* 102 Cal. Reptr. 782, 498 P.2d 1030 (1972).

ities that have nothing to do with the taxpayer's holding and management of its stocks or the dividend income they produce.

To deprive the State of commercial domicile of the power of taxation of the corporation's foreign source dividends to the extent that the income is spread under an apportionment formula among the other States, would be inherently distorting. As illustrated by the facts of the instant case, the non-domiciliary States are not the source of Mobil's foreign source dividend income. They provide Mobil no benefits or protection, and they incur no social costs in furnishing any public services to Mobil with respect to the company's ownership or management of the stock of its foreign subsidiaries and non-subsidiaries, or to Mobil's handling and disposition of the foreign source dividend income. (Stip. ¶¶7, 9, and 11, App. 82-83).

Tested by any of the accepted fiscal policy norms on which jurisdiction of the States to impose income taxes on a corporation is grounded—the source of the income, the benefits and protection afforded, or the costs of the business to the State (see *Curry* v. *McCanless,* 307 U.S. 357, 367-368 [1939]; *Wisconsin* v. *J.C. Penny Co.,* p. 444, *supra; Shaffer* v. *Carter,* 252 U.S. 37, 49-53 [1940]),[18] the claim of the State of commercial domicile to tax in their entirety the dividends of a corporation, all of whose business and activities as a holding and investing company are conducted in that State, is very compelling, whereas the claim of the States in which only manufacturing, selling or other operating functions are carried on to tax the dividends on an apportioned basis is without justification.[19]

[18] One tax economist, Professor John A. Wilkie of the University of Wisconsin, has set forth "four major different bases for the uniform and reasonable determination of tax jurisdiction" of corporate income as follows:

(Footnote continued)

In the opinion below, it was stated that, "[i]f Mobil's Commerce Clause argument prevailed, Mobil and similar

"(1) the 'source of income' basis . . .; (2) the 'activities of the corporation or its representative in whatever capacity' basis . . .; (3) the 'property sited and activities carried on' basis . . .; and (4) the 'property sited and regular place of substantial business' basis." ["A Basis for Taxing Corporate Net Income", 36 Taxes 807, 815 (1958)].

In elaborating on the source of income basis for taxation, Professor Wilkie declared that it should include the income from:

"(4) any securities . . . or other intangible property which have a 'business situs' within the state, which arise out of unitary business activities within the state (such as accounts receivable or bank deposits), or which are 'stock in trade' in business activities within the state; (5) any securities . . . or other intangible property not included in (4) above, and which are owned by a corporation whose commercial domicile . . . is within the state." (*Id.* at 816.)

[19] Since Mobil's commercial domicile was located in New York, the State under whose laws it was incorporated, this case does not present the question as to the extent to which the State of incorporation should be recognized as empowered to tax dividends in a case in which the corporation has established its commercial domicile in another State. See *United States Glue Co.* v. *Town of Oak Creek*, 247 U.S. 321 (1918); *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U.S. 325 (1920); the concurring opinion of four Justices in *Newark Fire Insurance Co.* v. *State Board*, 307 U.S. 313 (1939); 1 Willis Comm. Rep. at p. 160, note 14, *supra*.

If intangibles have become an integral part of a business carried on in a State, they acquire a "business situs" and may be taxed in that State. *New Orleans* v. *Stempel*, 175 U.S. 309, 316 (1899); *Liverpool L. & G. Insurance Co.* v. *New Orleans*, 221 U.S. 346 (1911); see *First Bank Stock Corp.* v. *Minnesota*, 301 U.S. 234, 237 (1937). *Newark Fire Insurance Co.* v. *State Board of Tax Appeals*, 307 U.S. 313, 319-321 (1939). In accordance with that doctrine, the principle that foreign source dividends are taxable in the State of the recipient's commercial domicile lends itself to an exception for dividends on stock that has acquired a business situs in another State. That State could properly be substituted for the recipient's domicile as the State entitled to tax the dividends in full. In point of fact, that rule as to the treatment of dividends obtains in some States. See Ariz. Rev. Stat. § 43-135(g), CCH 12-405; La. Rev. Stat. Ann. § 243(4), CCH 12-411; Okla. Stat. Tit. 68, § 2358A.-3.-b., CCH 12-425. The business situs question, however, does not arise in the case at bar, since Mobil's stocks in the foreign corporations whose dividends are at issue in this case had no business situs in Vermont. Stip. ¶11, App. 83.

corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability." The statement was presumably based on the fact that New York does not tax all dividends and that some States tax no dividends. (See Br. App. B, p. 5a).[20] The Vermont court has ignored the fact that the franchise or income tax is not the only State tax to which corporations are subject. A proper perspective requires consideration of the entire tax structure of the States and localities involved.

New York has one of the heaviest State and local tax burdens in the country, collecting annual per capital taxes of $1,252, as compared with the median of $749 for all States.[21] Corporations doing business in New York City, where Mobil's principal office is located (Stip. ¶7, App. 82), are subject to both a State and a New York City tax on their net income, to both State and City sales and use taxes and high property and other taxes.[22]

[20] Kentucky, Michigan, Missouri, Pennsylvania and West Virginia, which also impose income taxes, do not include any dividends in the tax base. See Ky. Rev. Stat. § 141, CCH 10-400, 410; Mich. Comp. Laws § 208, CCH 15-300, 304; Mo. Rev. Stat. § 143, CCH 10-400, 435; Pa. Stat. Ann. Tit. 72, CCH 10-700; W. Va. Code § 11-24-6, CCH 10-700, 715. In addition, Georgia, Florida and Ohio omit foreign source dividends from the tax base. See Br. App. B, p. 5a.

[21] The figures are for 1976-1977, the latest available. The New York per capita tax load is the highest in the country, except for Alaska. See "Governmental Finances in 1976-1977", p. 64, Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5).

[22] The following table summarizes the major taxes, in addition to property taxes, to which New York City businesses are subject:

Tax	*Rate*
New York State corporation franchise tax on net income (Art. 9-A)	10%
New York City general corporation tax on net income (Ch. 46, Tit. R)	9%

(Footnote continued)

Moreover, it is the prerogative of the State of commercial domicile to waive taxation, in whole or in part, of dividends properly within its province in order to effectuate its social or economic policies. The New York policy of partially exempting dividends from tax is counterposed by the imposition of other heavy taxes on corporations. That should not increase the constitutional power of other States to tax the dividends. (*Austin* v. *New Hampshire*, *supra*).

3. Commerce Clause Decisions of This Court Support Limitation of the Taxation of Foreign Source Dividends to a Single State to Avoid Multiple Taxation.

The affirmation of the power of the State of the commercial domicile to tax foreign source dividends, to the exclusion of other States, also finds support in the precedents of this Court in the resolution of other Commerce Clause taxation issues.

In the taxation of interstate sales, the Court recognized that, in the silence of Congress, the risk of multiple taxation required the power be lodged exclusively in one State. The Court has sustained the power of the States to impose on an out-of-State vendor (which has an adequate nexus with the State) the duty to collect a use tax on goods sold and shipped from other States to customers within the State.

Tax	*Rate*
New York City commercial rent and occupancy tax (Ch. 46, Tit. L)	6¾% on rent in excess of $11,000
New York State sales and use tax (Art. 28)	4%
New York City sales and use tax (Ch. 46, Tit. A)	4%

The references to New York State taxes are to the New York Tax Law, and the references to New York City taxes are to the City's Administrative Code.

As Mr. Justice Rutledge analyzed the matter in a leading sales-use tax opinion:

> ". . . the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.
>
> • • •
>
> "Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit . . ., or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.
>
> As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts." See Mr. Justice Rutledge's single opinion in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 349, at 360, *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, and *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1917).

As a consequence of this judicial resolution of the multiple taxation problem in the interstate sales-use tax area,

interstate sales, like intrastate sales, are subject to tax, and the "out-of-state seller runs no risk of double taxation." (*National Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 [1977]).

More recently, in the taxation of shipping containers used in foreign commerce and owned by foreign corporations based in other countries, this Court found it necessary once more to make a choice, this time in order to avoid multiple property taxation that is repugnant to the Foreign Commerce Clause. The Court chose to recognize as paramount the "right" and the "power" of the foreign countries in which the shipping lines were incorporated and maintained their principal places of business and commercial domiciles "to tax the containers in full". (*Japan Line, supra*, 47 U.S. L.W. at 4482). Accordingly, a California property tax on the shipping containers used in that State was invalidated because "notwithstanding apportionment", the tax "creates a substantial risk of multiple international taxation". (*Ibid.*).

4. Affirmation of the Sole Power of the State of the Commercial Domicile to Tax Foreign Source Dividends Is Not Inconsistent With the *Moorman* Case.

Affirmation by this Court of the rule that the State of a corporation's commercial domicile has the constitutional power to tax in full foreign source dividends received by a corporation engaged in foreign commerce, and that the other States in which the corporation conducts its business may not include such dividends within the apportionable bases of their taxes, is not inconsistent with the Court's approach to State tax apportionment of interstate income taken in the *Moorman* case.[23] A compelling factor in the

[23] The instant case does not present the issue as to whether the principles of the *Moorman* case should be extended to the division

(Footnote continued)

Court's unwillingness to strike down the Iowa apportionment formula was that the "prevention of duplicative taxation would require national uniform rules for the division of income." (437 U.S. at 279). The controversy in the instant case does not lie in a constitutional challenge to one method of apportionment as compared with others, but instead to the power of any State other than that of the taxpayer's commercial domicile to tax the foreign dividend income, whatever may be its method of apportionment. Consequently, a decision invalidating the Vermont tax does not involve the Court in prescribing uniform apportionment rules. Instead, the Court is asked to follow its precedent established in interstate sales and use taxation and the analogous method employed in passing on the taxation of property used in the foreign commerce, by holding that, under the Foreign Commerce Clause, one State and one State alone—the State of the corporation's commercial domicile—may tax dividends arising out of foreign source earnings, and that State may tax them in full.

of operating income of an international enterprise. State taxation of dividends arising from foreign source earnings raises different questions from State taxation of direct operating income of a United States corporation arising from operations abroad. That is because, *inter alia*, unlike the attribution of operating income, dividend income is allocated *in toto* by some States to the recipient's commercial domicile, whereas other States apportion dividend income in accordance with their formulas. See Br. App. B, p. 4a. No State seeks to tax in full the operating income of a foreign corporation conducting business within and without the State.

III.

The Vermont Tax Should Be Invalidated on the Ground That It Conflicts With Established Federal Policy in Regulating Foreign Commerce.

The primacy and predominance of the Federal Government in dealing with this country's foreign relations, including commerce with other countries, are so well established as to require little more than a statement of the principle. One need only mention the role played by the National Government in such areas as reciprocal Customs exemptions, Export-Import Bank loans, insurance against expropriation of investments in foreign countries, the Inter-American Development Bank, the Foreign Assistance Act, the Asian Development Bank, the General Agreement on Tariffs and Trade (GATT), the Trade Act of 1974, the Webb-Pomerene Act, international shipping and air transportation, the network of United States tax treaties with countries over the world, and the special provisions of the Internal Revenue Code enacted to encourage foreign commerce.[24]

[24] See Customs Convention on Containers, 20 U.S. Treaties and Other International Agreements 301, Treaties and Other International Acts Series No. 6634 (1956); Export-Import Bank Act of 1945, 12 U.S.C. § 635 *et seq.* (1945); Inter-American Development Bank Act, 22 U.S.C. § 283 *et seq.* (1959); Foreign Assistance Act of 1961, 22 U.S.C. § 2351 (1961); Asian Development Bank Act, 22 U.S.C. § 285 *et seq.* (1966); General Agreement on Tariffs and Trade (GATT), 61 Stat. A3, Treaties and Other International Acts Series No. 1700 (1947); Trade Act of 1974, § 2, 19 U.S.C. § 2101 (1974); Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (1964); Convention for Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 49 Stat. 3000, Treaty Series No. 876 (1935); Export Administration Act of 1969, § 3, 50 U.S.C. § 2401 (1969); note 29, p. 41, *infra;* notes 31 and 32, pp. 42-43, *infra.*

Because "[f]oreign commerce is preeminently a matter of national concern", this Court has recognized the constitutional precept that "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' Board of Trustees v. United States, 289 U.S. 48, 59 (1933)." (*Japan Line, supra,* 47 U.S.L.W. at 4481).

A. *Taxation of Dividends Derived From Foreign Commerce by a State Other Than the Recipient's Commercial Domicile Creates a Risk of Multiple Taxation Incompatible With the Established Federal Policies of Avoiding Double Taxation* of Foreign Source Income and Encouraging the Payment of Foreign Dividends.

1. There Is a Long-Established Congressional Policy of Encouraging Foreign Commerce by the Elimination of Double Taxation of Foreign Source Income.

For decades, Congressional tax legislation has been based on the policy that foreign commerce conducted by United States based enterprises should be fostered by eliminating double taxation of income from foreign sources. This has been done in part under the Federal income tax by granting to United States domestic corporations credits against income taxes paid to foreign governments. (I.R.C., §§ 901-904). The credit is granted not only for income taxes paid by the taxpayer to foreign governments, but it likewise extends to foreign income taxes paid by foreign corporations in which the taxpayer holds at least 10% of the voting stock (I.R.C., § 902). This "indirect credit" comes into play at the time the income of the foreign corporation is paid or deemed paid to the United States corporation as a dividend. (*Ibid.*).

Double taxation at the corporate level of dividends paid by domestic corporations out of foreign source earnings to United States corporations is fully or partially avoided

under the Federal income tax by the general treatment of dividends from domestic corporations, whether based on United States or foreign source earnings. Dividends received by a United States corporation from 80% or more owned domestic subsidiaries are entirely exempted from tax; and only 15% of the dividends received from less than 80% owned domestic corporations are taxed. (I.R.C., § 243).

The Congressional policy of eliminating double taxation of foreign source earnings has been in force since the Revenue Act of 1918.[25] As characterized by the Treasury Department, the policy was designed "to avoid burdensome double taxation and to encourage foreign trade." [26] Assistant Secretary of the Treasury for Tax Policy Stanley Surrey described the importance of this policy in the following words:

> "American investment would not proceed at all without the foreign tax credit because then, as the chairman pointed out, two taxes would be imposed and the overall burden of two taxes would be so great that international investment would practically cease." [27]

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[25] See 1918, 1921, 1924 and 1926 Acts, §§ 222, 238; 1928, 1932, 1934, 1936, 1938 Acts; 1939 Act, § 216 and the provisions of the IRC of 1954 cited in the text.

The credit came into the Federal income tax law in the Revenue Act of 1918 for both individuals and domestic corporations (§§ 222, 238). In reporting the provision, Congressman Kitchin, the spokesman for the House Ways and Means Committee, stated on the floor of the House:

> "That is not only a just provision but a very wise one. It is wise from the standpoint of the commerce of the United States, of the expansion of business of the United States. . . . We would discourage men from going out after commerce and business in different countries . . . if we maintained this double taxation." Seidman's Legislative History of Federal Income Tax Laws, 1938—1861, p. 928 (1938).

[26] House Ways and Means Committee Report, Revenue Bill of 1934, pp. 15-16 (H.R. Rep. No. 704, 73rd Cong. 2d Sess.).

[27] Hearings on United States-Brazil Tax Treaty, Senate Foreign Relations Committee, pp. 19-20 (90th Cong. 1st Sess., Oct. 5, 1967).

Congressional Committees have repeatedly recognized the importance of the Federal "obligation to insure that double taxation [of foreign source income] does not result." [28]

There is a whole series of other tax measures enacted by Congress that are likewise designed to encourage foreign commerce.[29]

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[28] Tax Reform Act of 1976, Senate Finance Committee Report on H.R. 10612, p. 233 (S.Rep. No. 94-938, 94th Cong. 2d Sess.); see General Explanation of the Tax Reform Act of 1976, Staff, Joint Committee on Taxation, H.R. 10612 (94 Cong. Pub. L. 94-455); Tax Reform Act of 1975, House Ways and Means Committee, Report on H.R. 10612 (H.Rep. No. 94-658, 94 Cong. 1st Sess.).

[29] The following sections of the Internal Revenue Code contain special preferential provisions designed to encourage foreign commerce by United States based corporations.

(a) 10-year operating loss carryforward in the case of a foreign expropriation loss (as defined in section 172(h)). § 172(b)(1)(D).

(b) Reciprocal exemption for earnings from the operation of foreign flag ships and aircraft and earnings from the use on a temporary basis of railroad rolling stock of foreign corporations. § 883.

(c) Increased taxation on nationals, residents, and corporations of foreign countries that impose more burdensome taxes or discriminatory taxes on citizens of the United States or U.S. corporations. § 896.

(d) Exclusions and deductions to citizens and residents of the United States present in a foreign country. §§ 911-913.

(e) Preferential treatment of Export Trade Corporations under Subpart F. §§ 970-971.

(f) Special tax benefits for Domestic International Sales Corporations. §§ 991-997.

(g) Tax benefit rule for the recovery of foreign expropriation losses. § 1351.

See also, Slowinski, "Federal Taxation and Foreign Policy", 20 U. of Fla. L. Rev. 489 (1968).

2. The Policies of Avoiding Double Taxation and Encouraging the Payment of Dividends Are Embodied in a Network of United States Tax Treaties.

The elimination of double taxation of foreign source income of American based companies has also become part of the standard fabric of United States tax treaties with foreign countries. As stated by Assistant Secretary of the Treasury for Tax Policy Edwin S. Cohen:

> "We have at the present time some 20 income tax treaties with foreign countries and about a dozen estate tax treaties, and we consider that these are quite important for the purpose of preventing double taxation by two or more countries of income and estates, and by eliminating this double taxation we remove fiscal barriers to international trade and investment." [30]

Most of the United States foreign tax treaties provide for removal of fiscal barriers to international trade or investment by guaranteeing U.S. corporate shareholders of foreign affiliates a credit for taxes paid to foreign governments.[31] They also provide for reductions in the rate of the foreign country's withholding tax imposed on United States shareholders with respect to dividends paid by local

[30] Hearings on Tax Conventions with Belgium, Finland, Trinidad and Tobago, and The Netherlands, Senate Foreign Relations Committee, p. 2 (91st Cong. 2d Sess., Oct. 6, 1970); see also Patrick, "A Comparison of the United States and OECD Model Income Tax Conventions", Law and Policy in International Business: Issues in International Taxation, 10 Intl. J. of Georgetown University Law Center 613 (1978).

[31] See, *e.g.*, United States Tax Treaties with Australia Art. XV, Belgium Art. 23, France Art. 23, The Federal Republic of Germany Art. XV, Japan Art. 5, United Kingdom Art. XIII and Netherlands Art. XIV. The text of the treaties is published in CCH Federal Tax Treaties. See also Patrick, note 30 *supra*, at 695-701.

companies.[32] These treaties serve not "only the purpose of encouraging investments" in foreign countries by United States enterprises, but also "the purpose of encouraging the payment of dividends, interest and royalties back to the United States because it lessens the double taxation of that income." [33]

3. Multiple State Taxation of Foreign Source Dividends Is Incompatible With the Federal Policies.

Because the States, unlike the Federal government, are not empowered to tax the global income of corporations (at least of corporations not domestic to the State), a different method is used by the States to deal with double taxation—the allocation and apportionment method. In theory, this method is designed to tax only the income attributable to the State, and thereby avoid overlapping State taxation of income. In practice, however, as the Court recognized in *Moorman, supra,* multiple taxation results from diverse State allocation and apportionment techniques. Because no State allows a foreign tax credit against the dividends it taxes, the consequence of the conflicting State rules is a clear and present danger of multiple State taxation of dividends derived from foreign earnings.

It is our contention that multiple taxation of foreign source dividends at the State level is not compatible with

[32] See, *e.g.*, United States Tax Treaties with Australia Art. VII, Belgium Art. 10, Canada Art. XI, France Art. 9, The Federal Republic of Germany Art. VI and Japan Art. 12. See also U.S. Treasury Department's Model Income Tax Treaty of March 17, 1977, Art. 10. CCH Federal Tax Treaties, ¶153; Draft Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Organization for Economic Cooperation and Development, *id.* ¶151.

[33] Testimony of Dr. Laurence Woodworth, Chief of Staff, Joint Committee on Taxation, Hearings, note 30 *supra*, at 45.

the established Federal policies of encouraging foreign commerce by eliminating duplicative national taxation of foreign source dividends and fostering payment of dividends from foreign sources.

We are not unmindful of the fact that there is no declaration in any Federal statute explicitly prohibiting taxation by more than one State of dividends derived from foreign commerce. However, this Court has not adopted so stringent a standard in determining whether State legislation is in conflict with Federal policy. Instead, the test as stated in a case passing on a Pennsylvania statute, is as follows:

> "Our primary function is to determine whether . . . Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines* v. *Davidowitz,* 312 U.S. 57, 67 [1941]).

In *McGoldrick* v. *Gulf Oil Corporation,* (309 U.S. 414 [1940]), the taxpayer attacked a New York City sales tax imposed on sales of fuel oil made by the company to the owners of vessels engaged in foreign commerce. Gulf imported crude oil from Venezuela, and entered it with the U.S. Custom Service under bond. The Federal statute authorized the importation of crude oil duty free, if the oil was placed under bond in the importer's warehouse for export, or for manufacture of fuel oil by the importer and the sale as ships' stores to vessels engaged in foreign commerce. The fuel oil in controversy had been manufactured in New York City by Gulf; no Federal duty was payable because the statutory exemption procedures had been complied with. Gulf challenged the New York City sales tax on sales of fuel oil to ocean going vessels as conflicting with that policy. This Court agreed, and invalidated the tax, saying:

> "As we have seen, the exemption and drawback provisions were designed, among other purposes, to relieve the importer of the import tax so that he might meet foreign competition in the sale of fuel as ships' stores. . . . It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. . . . The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state, pending its disposition as ships' stores and shall not become subject to the state taxing power. . . . The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce." (309 U.S. at 428-429).[34]

[34] That the exercise by the Federal Government of its taxing powers may at the same time involve the exercise of its power to regulate commerce was also reflected in a decision of a California Appellate Court. In invalidating a local property tax imposed on liquor distilled in Baltimore and shipped to San Francisco, where it was held in a United States Customs bonded warehouse for export, a California Appellate Court also applied the principle enunciated in the *Gulf Oil Corporation* case:

> "Appellant argues that the purpose of the strict governmental regulations under which the liquor is held is to prevent the diversion of the liquor to the domestic market without the payment of the Internal Revenue Tax. It seems obvious that this is one of the purposes of these regulations. However this does not necessarily mean, as appellant seems to imply, that these regulations constitute an exercise only of the taxing power to the exclusion of the commerce power. The Gulf Oil case indicates that appellant's position on this point is not well taken." *National Distillers Products Corp.* v. *City and County of San Francisco,* 141 Cal. App. 2d 651, 297 P.2d 61, 65 (1956).

In *Japan Line, supra,* the Court invalidated a State property tax on the ground that the levy would frustrate Federal policy, even though there was no Federal statute explicitly so providing. There, the Court concluded that State property taxation, albeit on an apportioned basis, of shipping containers used in foreign transportation by Japanese shippers, whose commercial domicile was located in Japan, was repugnant to the Customs Convention on Containers signed by the United States and Japan and to the international practice of taxing such containers in full by the country in which the shipping line is based.

Each of those cases, like the case at bar, involves its own particular business, State tax and Federal policy. Nevertheless, a common thread runs through all three situations, namely, that a State tax impinges on an established Federal policy regulating foreign commerce, and the crucial question is whether the State tax tends to frustrate that policy. We suggest that, just as the New York sales tax was found to frustrate the Federal customs exemption granted by Congress to oil importers, and the California apportioned property tax on containers was found to frustrate the Customs Convention and relations to other shipping nations, so the Vermont apportioned tax on the foreign source dividends of an out-of-state corporation engaged in foreign commerce, whose commercial domicile is not in Vermont, would frustrate Federal policies. The Vermont tax is "an obstacle to the accomplishment and execution of the full purposes and objectives" (*Hines* v. *Davidowitz, supra*) of Congressional legislation and U.S. tax treaties eliminating double taxation of income earned abroad and encouraging the payment of foreign dividends to U.S. corporations.

The incompatibility of the Vermont tax with Federal policy is likewise reflected in precepts developed by this Court in adjudging the validity of State taxes on interstate commerce. It has long been established in the taxation of interstate commerce that a State tax which imposes an "undue burden" on the commerce violates the Commerce Clause.[35] One of the resulting "corollary formulations" made by this Court is that a State tax which subjects interstate commerce to a risk of multiple taxation is an undue burden on the commerce.[36] As the analysis made above indicates, the diverse apportioned State taxes on foreign source dividend income by each of the States in which a corporation conducts business, coupled with the power of the State of commercial domicile to tax the dividends in full, would, indeed, subject a corporation engaged in foreign commerce receiving such dividends to a risk of multiple taxation of the income. (See pp. 26-30, *supra*). State taxation that subjects foreign commerce to the risk of undue tax burdens can hardly be regarded as compatible with the Federal policies of encouraging foreign trade and the payment of foreign source dividends by preventing double taxation of income. Duplicative State income taxation must inevitably, to some extent, constitute a disincentive to foreign trade and the payment of dividends, and thereby frustrate Federal policy.

The accommodation of State income taxation of foreign source dividends received by corporations engaged in foreign commerce to the Federal policies of eliminating multiple taxation and encouraging the payment of dividends from foreign source income cannot be accomplished if the States should be empowered to tax the dividends under their diverse apportionment formulas. Single taxation at

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[35] " * * * The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce." (Rutledge, J. in *McLeod* v. *Dilworth, et al.*, p. 18, supra, 322 U.S. at 358).

[36] *Ibid.;* see also *Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 461 (1959).

the State level can be accomplished only by recognition of the power of one State, and one State alone, to tax the foreign source dividends in full. The history of State taxation and the fiscal policy considerations underlying the power of taxation point unmistakably to the recognition that the power to tax foreign source dividends is lodged in the State of the recipient corporation's commercial domicile, and that State alone.

Accordingly, it is respectfully submitted that the Vermont tax should be stricken down as being repugnant to established Federal policies.

CONCLUSION

The decree of the Vermont Supreme Court should be reversed, with directions to set aside the assessment to the extent that foreign source dividends have been included in the apportionable base of the tax at issue.

Dated: June 26, 1979

Respectfully submitted,

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APPENDICES TO BRIEF

APPENDIX A

Statutes

Vermont Statutes Annotated, Title 32:

Section 5811 (18). "Vermont net income" means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states. However, "Vermont net income" shall not include the "gross-up dividends" required by the federal Internal Revenue Code to be taken into taxable income in connection with the taxpayer's election of the foreign tax credit. In the case of an "electing small business corporation" ("Subchapter S Corporation") under the laws of the United States, "Vermont net income" shall include only the taxable income of the corporation which is distributed to, or is undistributed to but allocable under the laws of the United States to, shareholders during the time while they are not residents of the state of Vermont. (Am. L. 1971, A. 73.)

. . .

Section 5833. Allocation and apportionment of income—(a) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be allocated to this state in full. If the income of a taxable corporation is derived from any trade, business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be

apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the end of the taxable year, (but the commissioner may require the use of the average of such value on the fifteenth or other day of each month, in cases where he determines that such computation is necessary to more accurately reflect the average value of property within Vermont during the taxable year), expressed as a percentage of all such property both within and without this state; (Am. L. 1971, c.73.)

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state.

(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges within or without this state.

(b) If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) Separate accounting; (2) The exclusion or modification of any or all of the factors; (3)

The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (Am. L. 1971, A. 73.)

APPENDIX B

Allocation or Apportionment of Dividends Included in the Tax Base*

State[1]	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Alabama		X	
Alaska		X	
Arizona	X		
Arkansas		X	
California	X		
Colorado		X	
Delaware			X
District of Columbia		X	
Hawaii		X	
Idaho		X	
Illinois		X	
Indiana		X	
Kansas		X	
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Minnesota	X		
Mississippi	X		
Montana		X	
Nebraska		X	
New Hampshire			X
New Jersey			X
New Mexico		X	
North Carolina		X	
North Dakota		X	
Oklahoma	X		
Oregon		X	
Rhode Island			X
South Carolina	X		
Tennessee		X	
Utah		X	
Vermont			X
Wisconsin			X
Total[2]	7	19	8

Appendix B

* This table includes only jurisdictions which include foreign source dividends, in part or in whole, in the tax base. Georgia, Florida and Ohio have been omitted because foreign source dividends are not taxable (Ga. Code §92-3102, CCH 10-512, 11-512), or they are taxable only if the payor transacts a substantial portion of its business, or has a substantial portion of its assets, in the United States (Fla. Stat. §220.13, CCH 10-310), or has physical assets located in the State (Ohio Rev. Code Ann. §5733, CCH 10-309, 336, 378, 11-425).

1. Ala. Code Tit. 40, §40-18-34, CCH 10-535, 15-090; Alaska Stat. §§43.19.010, 43.20.065, CCH 12-417, 418; Ariz. Rev. Stat. §43-135(g), CCH 12-405; Ark. Stat. Ann. §§84-2055(a), 2058, 2061, 2063, CCH 11-537, 572; Cal. Rev. & Tax. Code §25126, CCH 12-428; Colo. Rev. Stat. §24-60-1301, CCH 12-538; Del. Code Tit. 30, §1903(b)(6), CCH 10-840; D.C. Code §47-1580(a), CCH 12-405, 413; Haw. Rev. Stat. §§235-22, 27, 29, CCH 12-530, 540; Idaho Code §63-3027(g), (i), CCH 12-490, 510; Ill. Rev. Stat. Ch. 20, §301, 304, CCH 90-907, 916; Ind. Code Ann. §6-3-2-2, CCH 12-405, 415, 448; Kan. Stat. §§79-3274, 3277, 3279, CCH 12-478, 490; La. Rev. Stat. Ann. §243, CCH 12-411; Me. Rev. Stat. Tit. 36, §§5211(6), (8), CCH 12-460, 465; Md. Ann. Code Art. 81, §316(e), CCH 12-410, 420; Mass. Gen. Laws Ann. Ch. 63, §38(a)(1), (c) CCH 10-324, 330; Minn. Stat. §290.17, CCH 12-407; Miss. Code Ann. §27-7-23(1)(a); Miss. Inc. Tax Reg. §1.27-7-23(1), CCH 12-405, 407, 435; Mont. Rev. Codes Ann. §84-1503, CCH 11-501(c), (f), (h); Neb. Rev. Stat. §77-2735(4), 2741, 2743, CCH 12-425, 445, 455; N.H. Rev. Stat. Ann. §77-A:3, CCH 15-350, 355; N.J. Rev. Stat. §54:10A-6, CCH 5-805, 810; N.M. Stat. Ann. §§72-15A-20, 23, CCH 12-425, 455; 465; N.C. Gen. Stat. §105-130.4(c), (f), (i), CCH 10-805, 820; N.D. Cent. Code §57-38.1, CCH 12-454, 460, 464; Okla. Stat. Tit. 68, §2358A, CCH 12-425; Or. Rev. Stat. §314.625, 640, 650, CCH 12-414, 418, 422; R.I. Gen. Laws §44-11-14, CCH 10-810; S.C. Code §12-7-1120, CCH 12-435; Tenn. Code Ann. §67-2709, 2712, 2714, CCH 12-419, 425, 429; Utah Code Ann. §59-13-81, 84, 86, CCH 11-515, 530, 540; Vt. Stat. Ann. Tit. 32, §5833(a), CCH 12-410; Wis. Stat. Ann. §71.07(1m)(2), CCH 12-404(a), 409. All CCH references are to the relevant paragraphs in the Commerce Clearing House, Inc. State Tax Reporter Service.

2. Four States that tax foreign source dividends have been omitted from the table because their methods of allocation or apportionment do not fit into the scheme used by most States.

Connecticut: Allocates dividends from subsidiaries by reference to the ratio of the payor's business done in the State; non-subsidiary dividends are apportioned if they constitute an integral part of the recipient's regular business operations (Conn. Gen. Stat. §12-218, CCH 10-815, 825).

Iowa: There appears to be a conflict between the statute and the rules as to the extent to which dividends are allocated or apportioned (Iowa Code §422.33, CCH 12-520; Iowa Rule 54.2(1), CCH 12-522).

New York: Includes in the tax base only non-subsidiary dividends (to the extent of 50%), which it allocates in the ratio of the payor's New York apportionment percentages (N.Y. Tax Law §210, CCH 5-829—841, 9-581).

Virginia: Dividends of non-subsidiaries are allocated to the State if it is the recipient's commercial domicile; dividends paid by subsidiaries are apportioned (Va. Code §58-151.040, CCH 12-445).

APPENDIX C-1

Chart of State Rules On Allocation and Apportionment*

State Col. A	Factors of Apportionment Fractions: Property Col. B	Receipts Col. C	Payroll Col. D	Others Col. E	Items Separately Allocated Col. F	Separate Accounting Allowed? Col. G(2)
ALA.(1,6)	Yes	Yes	Yes	(6-7)	(1-5)	Yes(2)
ALASKA(9)	Yes	Yes	Yes	(4)	(1-5)	Yes
ARK.(6,9)	Yes	Yes	Yes	(4,6)	(1-5)	Yes
COLO.(9)	Yes	Yes	No		(2-4,11,15,17)	Yes
DEL.	Yes	Yes	Yes	(7)	(2,3,5,15,16,20)	Yes
D.C.(6)	Yes	Yes	Yes	(4)	(1-5)	Yes
HAW.(6,9,15)	Yes	Yes	Yes	(6)	(1-5)	Yes
IDAHO(6,9)	Yes	Yes	Yes		(1-5)	Yes
ILL.(6)	Yes	Yes	Yes	(6)	(1-5)	Yes
IND.(2,6)	Yes	Yes	Yes		(1-5)	Yes
KAN.(6,9)	Yes	Yes	Yes	(6)	(1-5)	Yes
ME.(6,7,8)	Yes	Yes	Yes		(1-5)	Yes
MD.	Yes	Yes	Yes	(5)	(1-3)	Yes
MASS.	Yes	Yes(3)	Yes	(5)	(4)	Yes
MONT.(6,8,9)	Yes	Yes	Yes		(1-5)	Yes
NEB.(6,7,9)	Yes	Yes	Yes		(1-5)	Yes
N.H.	Yes	Yes	Yes	(7)		No
N.J.(15)	Yes	Yes	Yes	(9)		No
N.M.(6,9)	Yes	Yes	Yes	(6,12)	(1-5)	Yes
N.C.(6,8)	Yes	Yes	Yes	(4,6)	(1-5,9)	Yes
N.D.(6,9)	Yes	Yes	Yes	(16)	(1-5)	Yes
ORE.(6,8,9)	Yes	Yes	Yes	(4,6)	(1-5)	Yes
R.I.	Yes	Yes	Yes			(1)
TENN.(6)	Yes	Yes	Yes(5)	(4,6)	(1-5)	Yes
UTAH(6,8,9)	Yes	Yes	Yes		(1-5)	Yes
VT.	Yes	Yes	Yes	(7)	(2-3,24)	(1)
WIS.(4, 13)	Yes(1)	Yes(2)	Yes(3,4)	(2-4,6)	(2-5,15,20)	Yes

Appendix C-1

* The materials reproduced in Appendices C-1-C-4 are taken from Prentice-Hall, State and Local Taxes, All States Unit, ¶¶1046–1048-A. The tables include only those jurisdictions which include foreign source dividends in part or in whole in the tax base subject to apportionment.

Col. A. (1) Domestic corporations and residents can't allocate. (2) Gross income tax allows no allocation. (4) Disallows equally weighted 3-factor formula. (6) Uniform Div. of Income for Tax Purposes Act (UDITPA) is substantially adopted (see footnote (9) for states also adopting UDITPA under Multistate Tax Compact). (8) Only for corporations and nonresident individuals. (9) State has adopted Multistate Tax Compact (MTC), including 3-factor formula. Taxpayer may elect to allocate by 3-factor formula. (11) Disallows equally weighted 3-factor formula. (13) Resident individuals can't allocate. (15) Only nonresidents allocate-apportion for gross (personal) income tax, using methods set by Dir.'s Regs.

Col. B. (1) Factor represents 25% of formula.

Col. C. (2) Factor is 50% of formula. (3) Sales factor used twice.

Col. D. (3) Factor is 25% of formula. (4) Payroll factor replaces cost factor. (5) See footnote (6), Col. A.

Col. E. (2) Manufacturers' costs. (3) For businesses other than manufacture or sale of tangible personalty, Dir. may make rules. (4) Special provisions apply to some or all carriers. (5) Special provisions for construction cos. (6) Special provisions for specialized businesses (e.g., utility, financial and service businesses, etc.). (7) Such other factors as Admr. deems applicable. (9) Use assets allocation if producing greater percentage than average of Col. B, C and D. (12) Operating expenses. (16) Special provisions for financial business.

Col. F. (1) Capital gains; (2) Rents. (3) Royalties (in S.C. limited to tangibles). (4) Dividends (in Mass. not included in tax base; in Ohio, if not deducted or excluded for corporate net income). (5) Interest. (9) Income from sale of realty. (11) Interest from intangible personalty not used in business and not inventory. (15) Gain or loss from capital assets. (16) Gain or loss on realty sale. (17) Gain from sale of corporate stocks. (20) Gain or loss from intangibles. (24) Income from any trade, business, all instate. (26) Single Business tax allows deduction from base; dividends, interest, royalties and certain capital losses.

Gol. G. (1) No specific provision. (2) Separate accounting, if allowed, may require official approval.

APPENDIX C-2

Receipts Factor

STATE Col. A(1)	Office Where Negotiated Col. B	Property at Time of Order Col. C	Receipt or Acceptance of Order Col. D	Negotiating Personnel Col. E	Delivery Place Col. F	Shipment Origin Col. G	Other Col. H
ALA.					X	X(2, 3)	X(9)
ALASKA					X	X(2, 3)	X(3, 9)
ARK.						X(2, 3)	X(7)
COLO.	X(5)			X(2)	X(1)		
DEL.					X(1)	X(3)	
D.C.		X(2)			X		X(3, 9)
HAW.					X	X(2, 3)	X(3, 9)
IDAHO					X	X(2, 3)	X(3, 9)
ILL.					X	X(2, 3)	X(3, 9)
IND.					X	X(2, 3)	X(3, 9)
KAN.					X	X(2, 3)	X(3, 9)
ME.					X	X(2, 3)	X(3, 9)
MD.					X		X(3, 9)
MASS.	X(3)				X		X(3, 9, 14)
MONT.					X	X(2, 3)	X(3, 9)
NEB.					X	X(2, 3)	X(3, 9)
N.H.		X(2)		X(1, 2)	X(2, 4)	X(1)	X(3, 9)
N.J.		X			X(5)		X(4)
N.M.					X	X(2, 3)	X(3, 9)
N.C.					X		X(2, 6)
N.D.					X	X(2, 3)	X(3, 9)
ORE.					X	X(2, 3)	X(3, 9)
R.I.					X		X(2)
TENN.					X(2)	X(2)	X(3, 9)
UTAH	X(2, 5)				X(2)	X(2, 3)	X(3, 9)
VT.		X(1)	X(1)				X(4)
WIS.					X	X(2,3,7)	X(3, 12)

Appendix C-2

Col. A. (1) For member states of Multistate Tax Compact, see Br. App. C-1.

Col. B. (2) Sales through or by instate offices, agencies or branches and taxpayer not taxed in buyer's state. (3) Sales not negotiated or effected by agents or agencies chiefly at, connected with or sent out from business premises outstate. (4) Includes sales between outstate points if order secured or received by state office or salesman working from it. (5) Public or private warehouse treated like office.

Col. C. (1) Property instate on receipt or appropriation to order, or not at taxpayer's outstate business place when order received or accepted instate. (2) If taxpayer not taxed in destination state.

Col. D. (1) See Col. C.

Col. E. (1) Place where selling is performed. (2) Promotional acts given weight.

Col. F. (1) Deliveries in state, excluding deliveries for out-shipment. (2) Sales to customers instate. (4) See Col. H(10). (5) See Col. C.

Col. G. (1) Controlling factor when delivery is in same state. (2) If purchaser is U.S. government. (3) If taxpayer is not taxable in purchaser's state. (7) Only 50% of tangible personalty sales under "throwback" rule is in numerator (eff. starting 1979 tax year).

Col. H. (2) Receipts from instate sources. (3) For sale of intangibles, allocate instate if income-producing (earnings-producing, in Tenn.) activity is instate or Col. H(9) applies. (4) Receipts from instate serviees and rentals or royalties on property in or used in state. (6) Services instate (in N.C., if income-producing activities are instate). (7) If income-producing activity is instate for nontangibles; if multistate, Ark. share is same formula percentage used in allocating income of year. (9) For sales of intangibles, state with largest share of costs of performance. (10) Though sales of intangibles are included in 3-factor apportionment, there's no provision indicating which go in numerator. (11) If not taxed in purchaser's state. "Purchaser" includes U.S. (12) For intangibles and services allocate between states in ratio of local-to-total production costs. (14) Footnote (11) applies but deliveries in foreign countries and sales to US for resale to foreign govts. are treated as taxable in buyer's state.

APPENDIX C-3

Property Factor

STATE(22)	Col. A Owned Realty	Col. B Rented Realty	Col. C Owned Tangible Personalty	Col. D Rented Tangible Personalty	Col. E Goods in Transit	Col. F(7) Migratory Property
ALA.	X	(2, 5)	X	(2, 5)	X(23)	X(13)
ALASKA	X	X(2)	X	X(2)	X(23)	X(13)
ARK.	X	X(2)	X	X(2)	(1)	(1)
COLO.(4)	X	(1)	X	(1)	(1)	(1)
DEL.(4)	X	X(2)	X	X(2)	(1)	(1)
D.C.(4)	X	X(2)	X	X(2)	(1)	X(14)
HAW.(4)	X	X(2)	X	X(2)	(1)	X(13)
IDA.(4)	X	X(2)	X	X(2)	X(23)	X(13)
ILL.	X	X	X	X	(1)	X(13)
IND.(4)	X	X(2)	X	X(2)	X(23)	X(13, 14)
KAN.	X	X(2)	X	X(2)	(1)	X(1)
ME.(4)	X	X(2)	X	X(2)	X(23)	X(13)
MD.(4)	X	X(2)	X	X(2)	(1)	(1)
MASS.(25)	X	X(2)	X	X(2)	(1)	(1)
MONT.(4)	X	X(2)	X	X(2)	(1)	(1)
NEB.(4)	X	X(2)	X	X(2)	X(23)	X(13)
N.H.	X	X(2)	X	X(2)	(1)	(1)
N.J.	X	(6)	X	(6)	(10-12)	(1)
N.M.(4)	X	X(2)	X	X(2)	X(23)	X(13)
N.C.(4)	X	X(2, 26)	X	X(2)	X(23)	X(13)
N.D.(4)	X	X(2)	X	X(2)	X(23)	X(13)
ORE.(4)	X	X(2)	X	X(2)	X(23)	X(13)
R.I.	X	X(2)	X	X(2)	X(10-12)	X(14)
TENN.	X	X(2)	X	X(2)	(1)	(1)
UTAH(4)	X	X(2)	X	X(2)	X(23)	X(13)
VT.	X	X(2)	X	(6)	(10-12)	(1)
WIS.(4)	X	X(2)	X	X(2)	X(18)	X(13)

Appendix C-3

(1) No specific provision.

(2) 8 times net annual rent.

(4) If income specifically allocated, non-allocable or exempt, exclude property.

(5) Property used is included.

(6) Specifically excluded. N.J.—applies to corporation business (franchise) tax.

(7) Carrier rules for rolling stock listed in absence of general rules.

(10) Goods in transit between outstate points included in denominator only.

(11) Goods in transit between instate points included in numerator and denominator.

(12) Goods in transit between instate and outstate points excluded from numerator and denominator.

(13) In numerator on percentage of time spent basis.

(14) In numerator on percentage of mileage basis.

(18) Treated to be at destination.

(22) For member states of Multistate Tax Compact, see Br. App. C-1.

(23) In numerator (destination state) if regularly included in denominator.

(25) "Real and tangible personalty" include leases and their improvements whether in or outstate.

(26) Subrentals aren't deductible if "business income".

APPENDIX C-4

Payroll Factor

STATE Col. A (1)	Office Location Col. B	Time Spent in State(1) Col. C	Compensation Earned in State Col. D	Other Col. E
ALA.	X(7)		X(1, 8, 9)	
ALASKA	X(7)	X(2, 3)	X(1, 8, 9)	
ARK.	X(7)		X(1, 8, 9)	
COLO. (2)	X(7)		X(1, 8, 9)	
DEL.			X(2)	
D.C.	X(7)		X(1, 8, 9)	
HAW.	X(7)		X(1, 8, 9)	
IDAHO	X(7)		X(1, 8, 9)	
ILL.	X(7)		X(1, 8, 9)	
IND.	X(7)		X(1, 8, 9)	
KAN.	X(7)		X(1, 8, 9)	
ME.	X(7)		X(1, 8, 9)	
MD.	X(7)		X(1, 8, 9)	
MASS. (3)	X(7)		X(1, 8, 9)	
MONT.	X(7)		X(1, 8, 9)	
NEB.	X(7)		X(1, 8, 9)	
N.H.	X(7)		X(1, 9)	
N.J.	X(7)		X(1, 8, 9)	X(8)
N.M.	X(7)		X(1, 8, 9)	
N.C.	X(7)		X(1, 8, 9)	
N.D.	X(7)		X(1, 8, 9)	
ORE.	X(7)		X(8)	
R.I.				X(7)
TENN.	X(7)		X(1, 9)	
UTAH	X(7)		X(1, 8, 9)	
VT.	X(1, 8)	X(5)	X(10)	X(1)
WIS.	X(7)		X(1, 8, 9)	

Appendix C-4

Co. A. (1) For member states of Multistate Tax Compact, see Br. App. C-1. (2) As member state of Multistate Tax Compact, 3-factor formula (including payroll) may be elected. (3) Manufacturing and business primarily in research and development allocate in ratio of local-to-total payroll.

Col. B. (1) N.C., Vt.—If chief headquarters. (5) Haw.—If either employed in state or identified with office in state. (7) If part performance and controlling base instate, or residence instate. (8) Vt.—See Col. C, D, E, if inequitable.

Col. C. (1) Applies to those working in and out of state. (2) Alaska.—Seagoing personnel, use port days. (3) Alaska.—Transportation workers, use working days. (5) Vt.—If office factor inequitable, for employees paid on time basis.

Col. D. (1) If some of the service is performed instate and base of operations or control or individual's residence is instate. (2) Del.—If employee within state. (6) Haw.—If either employed in state or identified with office in state. (8) See Col. B footnote for state. (9) Also service entirely instate or having only incidentals outside. (10) Vt.—If office factor inequitable, see Col. E.

Col. E. (1) Vt.—If office factor inequitable: salesmen on commission, on basis of business volume; compensation based on results achieved, on value of instate services. (7) Connected with instate activities or transactions. (8) N.J.—Also if contributions not paid under unemployment compensation law of another state.

APPENDIX C-5

Methods of Valuing Property In Property Factors

State[1]	Original Cost	Book Net Value	Federal Tax Net Value
ALA.	X		
ALASKA	X		
ARK.	X		
COLO.	X (MTC)		X (traditional formula)
DEL.	X		
D.C.	X		
HAW.	X		
IDAHO	X		
ILL.	X		
IND.	X		
KAN.	X		
ME.	X		
MD.	X		
MASS.			X
MONT.	X		
NEB.	X		
N.H.	X		
N.J.		X	
N.M.	X		
N.C.	X		
N.D.	X		
ORE.	X		
R.I.		X	
TENN.	X		
UTAH	X		
VT.		X	
WIS.	X		

Appendix C-5

1. Ala. Reg. 31.2.11, CCH 15-247; Alaska Stat. §43.19.010, Art. IV.11, CCH 96-809b; Ark. Stat. Ann. §84-2065 (UDITPA), CCH 94-689, and Ark. Stat. Ann. §84-4101, Art. IV.11 (Multistate Tax Compact, "MTC"), CCH 94-994; Colo. Rev. Stat. §39-22-303(2)(b) (traditional provision), CCH 94-615, Return Sch. A, CCH 13-438, and Colo. Rev. Stat. §24-60-1301, Art. IV.11 (MTC), CCH 92-755; Del. Code Ann. Tit. 30, §1903(b)6(A), CCH 92-329; D.C. Reg. §309.5F(4), CCH 12-413; Haw. Rev. Stat. §235-31 (UDITPA), CCH 92-441, and Haw. Rev. Stat. §255-1, Art. IV.11 (MTC), CCH 94-115; Idaho Code §63-3027(k) (UDITPA), CCH 94-155b, and Idaho Code §63-3701, Art. IV.11 (MTC), CCH 94-984; Ill. Rev. Stat. §304(1)(B), CCH 90-918; Ind. Code 6-3-2-2, §2(c), CCH 95-138; Kan. Stat. §79-3281 (UDITPA), CCH 94-075, and Kan. Stat. §79-4301, Art. IV.11 (MTC), CCH 95-225; Me. Rev. Stat. Tit. 36, §5211.10, CCH 95-110; Md. Reg. 03.04.01.03E(3), CCH 12-426; Mass. Gen. Laws Ann. Ch. 63, §38(d), CCH 91-293; Mont. Rev. Codes Ann. §15-31-307(1) (UDITPA), CCH 95-365, and Mont. Rev. Codes Ann. §15-1-601, Art. IV.11 (MTC), CCH 92-151; Neb. Rev. Stat. §77-2745 (UDITPA), CCH 92-818, and Neb. Rev. Stat. §77-2901, Art. IV.11 (MTC), CCH 92-995d; N.H. Rev. Stat. Ann. §77-A:3.I, CCH 91-618, Return Sch. A, CCH 16-420; N.J. Rev. Stat. §54:10A-6(A), CCH 94-054, Return Sch. J. CCH 6-410; N.M. Stat. Ann. §72-15A-27 (UDITPA), CCH 95-648, and N.M. Stat. Ann. §72-15A-37, Art. IV.11 (MTC), CCH 95-672; N.C. Gen. Stat. §105-130.4(j)(2), CCH 92-070a; N.D. Cent. Code §57-38.1-11 (UDITPA), CCH 95-075, and N.D. Cent. Code §57-59-01, Art. IV.11 (MTC), CCH 96-625; Or. Rev. Stat. §314.655(2) (UDITPA), CCH 94-143a, and Or. Rev. Stat. §305.655, Art. IV.11 (MTC), CCH 92-007; R.I. Gen. Laws §44-11-14(1), CCH 93-279; Tenn. Code Ann. §67-2716, CCH 95-533; Utah Code Ann. §59-13-88 (UDITPA), CCH 92-747, and Utah Code Ann. §59-22-1, Art. IV.11 (MTC), CCH 93-303n; Vt. Stat. Ann. Tit. 32, §5833(a)(1), CCH 93-109, Corp. Apportionment Sch., CCH 13-385; Wis. Stat. §71-07(2)(a)3, CCH 91-547.